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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 406

FRANK MADAFFER,

Petitioner,

vs.

THE UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT AND BRIEF IN SUPPORT THEREOF.

EDWARD E. PETRILLO,
Counsel for Petitioner.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 406

FRANK MADAFFER,

Petitioner,

vs.

THE UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The petitioner, Frank Madaffer, respectfully prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Third Circuit, entered in this case, August 2, 1945.

Statement of Jurisdiction

The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, 28 U. S. C.; Section 347(a),

and under Sections 687, 688, Title 18, U. S. Code, and the Rules of Criminal Procedure adopted thereunder, particularly Rule 11. This petition is filed within thirty days from the date of the judgment, in accordance with the rules.

Opinions Below

The decision of the United States Court of Appeals for the Third Circuit, now sought to be reviewed, is as follows:

"Per CURIAM:

The judgment of the District Court is affirmed."

There was no other opinion in the District Court.

Statement of Matter Involved

I

The judgment of the Circuit Court of Appeals sought to be reviewed, affirmed a judgment convicting the petitioner and others, of violating Section 398 of Title 18, of the Criminal Code of the United States, in that he conspired with the other co-defendants to transport certain girls, to-wit: Madeline Ruth Smith and her sister, Mary Jane Michaelchick, from Youngstown, Ohio, to Meadville, Pennsylvania.

There were several indictments, which, in substance, charged that petitioner and other co-defendants, between the dates of December 7, 1941, and January 20, 1943, conspired to violate the provisions of the aforesaid Statute. The indictments also charged the petitioner and the other co-defendants with the commission of certain overt acts in pursuance of the conspiracy.

The case came on for trial before a Judge of the District Court for the Western District of Pennsylvania, and a Jury, in the city of Pittsburgh, Pennsylvania, on the 14th day of December, 1944. The jury found all of the defendants

guilty, as indicted. Sentence was pronounced on the defendants on the 5th day of January, 1945. Petitioner was sentenced to three years imprisonment on the first indictment, two years on the second indictment, and three years on the third indictment, to run concurrently.

II

The case was tried by the prosecution and submitted by the trial court to the jury on the specific issues of petitioner's participation in the crime of transporting the two girls, Madeline Ruth Smith and Mary Jane Michaelchick, from Youngstown, Ohio, to Meadville, Pennsylvania, for the purpose of prostitution, and of conspiracy to commit such a crime. The most damaging proof in this case was the evidence offered by the two witnesses produced by the prosecution, who were the alleged victims of this crime, to-wit: Madeline Ruth Smith and her sister, Mary Jane Michaelchick.

This proof tended to establish the following facts: On December 11, 1941, petitioner Frank Madaffer, together with Frank Anthony Chessario, a co-defendant, went from the City of Youngstown, Ohio, where they met two women, whom the prosecution identified as Madeline Ruth Smith, and another girl called by the name of Laura Jane Duffy, also known as "Penny", and that the defendant transported these two girls from the city of Youngstown, Ohio, to Meadville, Pennsylvania, where they were placed in a house of prostitution.

Madeline Smith, however, when she took the stand, testified that on the 11th day of December, 1941, when she met petitioner Madaffer in Youngstown, she was alone, and not in company with Laura Jane Duffy, alias "Penny". Laura Jane Duffy, when she took the stand, testified in her direct examination, and on cross-examination, that she was not

transported by petitioner Frank Madaffer from Youngstown, Ohio, to Meadville, Pennsylvania, but by Frank Chessario, a co-defendant and by another man, who, the witness stated most positively, was not petitioner Frank Madaffer. On Page 162 of the transcribed notes of testimony, Miss Duffy states: "I never met Frank Madaffer in Youngstown, Ohio." The sister of Madeline Smith, Mary Jane Michaelchick, who before her marriage was Mary Jane Smith, testified that she met Frank Madaffer during the month of May, 1942, at the Youngstown Hotel in Youngstown, Ohio, having been introduced to him by his sister, Madeline Smith, and that she made arrangements with him to go to Meadville, Pennsylvania, some following Friday afternoon, and that in pursuance of said arrangement, she went to Meadville and was placed in a house on Park Avenue, where she practiced prostitution. She testified, however, that Frank Madaffer, the petitioner in this case, was accompanied by a man named Ben Kaufman, and not by Frank Chessario, as alleged by the prosecution. These (Frank Chessario, Madeline Smith and her sister Mary Jane Michaelchick) were the only witnesses who testified as to the actual transportation from Ohio to Pennsylvania. Ben Kaufman was not called as a witness by the prosecution and was not charged as a defendant in the case, neither was a brother of the co-defendant, Frank Chessario, who was named by some of the witnesses as one of the persons who had participated in the transportation of the two aforesaid girls from Ohio to Pennsylvania. The other witnesses, and there were many of them, frankly testified that Frank Madaffer had nothing to do with their transportation in and out of the city of Meadville.

Petitioner denied all allegations charging him with the commission of the alleged crime, stating that he had never made any arrangements to transport Madeline Smith, or

her sister, Mary Jane Michaelchick. He denied having had any connection with a house of prostitution located in the city of Meadville, Pennsylvania, or in any other place, and insisted that his former friend, Frank Chessario, falsely was seeking to involve him because of ill feelings engendered by the failure on the part of his said former friend to repay a loan in the sum of Nine Hundred ($900.00) Dollars, which loan petitioner had made to the said Frank Chessario during the time of the alleged transportation and operation of the house of prostitution. Petitioner also stated that Madeline Smith, one of the most important government witnesses, had been very friendly with him at one time, and that later they had some disagreement which caused her to become very bitter against him. This disagreement appeared to be entirely of a sentimental nature.

The petitioner's guilt or innocence, as an alleged participant in the conspiracy and the overt act, depended entirely on the weight which the jury would naturally attach to the credibility of the witnesses and alleged accomplices. It was, therefore, of great importance that the jury scrutinize with special care the testimony of those witnesses, so that it could determine if there existed any bias or personal feeling, which might cause said witnesses to commit perjury in order to falsely involve the petitioner and thus gain a sordid satisfaction.

The case came on for trial on December 14, 1944, at 10 A. M., which was on a Thursday. Madeline Smith took the stand and testified on the afternoon of that day. Upon the adjournment of that day's session, petitioner brought to the attention of his counsel, Edward E. Petrillo, certain actions and statements on the part of said witness Madeline Smith, which occurred during the day and night immediately preceding the opening of the trial, that is between

the dates of December 13th and December 14th, 1944. These actions and statements were of such importance that, in the opinion of counsel for the petitioner, they strongly indicated the existence of one of the most gross and flagrant instances of perjury ever attempted during the trial of a case. It became necessary to then cross-examine the witness in order to expose the falsity of her previous testimony. During the following morning's session (i.e. December 15th) and before the noon adjournment, petitioner's counsel requested the court for leave to further cross-examine the witness Madeline Smith. The request then made is as follows:

> "Mr. Petrillo: On behalf of the defendant Madaffer, we would like in the first place to have some further cross examination of the defendant Shirley Cooper and the witness Madeline Smith; and then also on behalf of Frank Madaffer we would like to make our own witness the witness Laura Duffy, who is known as Penny and the witness Martizen for rebuttal, and the witness Sillato for rebutttl."

The Court made no ruling on this request (see notes of testimony, pages 243 and 254), and recessed until 1:30 o'clock in the afternoon.

Shortly after the opening of the afternoon session, the Government, after recalling a witness for short interrogation, and after offering in evidence certain Government exhibits, rested its case. This was, of course, in direct disregard of the request of petitioner's counsel for permission to cross-examine the witness Madeline Smith. Therefore, counsel for petitioner immediately objected as follows:

> "Mr. Petrillo: If the Court please, I wanted to have the witness Smith for further cross examination. I think I told Mr. Boyle before noon adjournment."

This, the Court refused to permit.

III

How important was the cross-examination of this witness? In the first place, it must be remembered that Madeline Smith, and her sister, Mary Jane Smith Michaelchick were the two girls alleged to have been transported from Ohio to Pennsylvania. They were not co-defendants, and much credibility was attached by the jury to their testimony. In the second place, it must be remembered that the petitioner denied that he had transported either of these women. In the third place, the following evidence which was submitted by petitioner on direct examination, upon the trial court's refusal to permit cross-examination of the witness involved, was of such nature as to strongly indicate the existence of such bias on the part of the said Madeline Smith, and her sister, as to lead inevitably to the conclusion that perjury had been committed by them in order to obtain a sordid satisfaction out of injuring petitioner.

This evidence was to the effect that Madeline Smith approached petitioner, while he was standing in the corridor of the Court House, waiting for his trial to commence, and sought to engage him in conversation. This was sometime during the afternoon of December 13, 1944. Petitioner refused to speak with her, and told her to stay away from him for the reason that she was a Government witness who was scheduled to testify against him and he didn't want to become involved in any more trouble because of her. Miss Smith thereupon told him: "I will not get you into any trouble," and, after stating that she was not a witness in his case, pulled out a card and showed it to him to prove that her name was not listed as a witness in his case. She then said: "My sister is on your case." Finally, she requested petitioner to meet her outside of the Court House, which he refused to do. Petitioner, being suspicious of

Miss Smith's actions, and fearful of possible further wrongdoing on her part, immediately reported the matter to one of the F. B. I. agents, a Mr. Hopkins, who at that time was somewhere in the same corridor.

During the night, however, Madeline Smith went to the Fort Pitt Hotel, in the city of Pittsburgh, where the trial of this case was taking place, and rapped at the door of the petitioner's room, and asked him to let her in. Petitioner stated that he recognized the voice as that of Madeline Smith, and that he refused to admit her. It was testified that she kept insisting that she wanted to get in, and persisted in trying to gain admission, and that petitioner refused to let her in. This attempt on her part to get into petitioner's room at the hotel was brought to a stop by a house detective, who escorted her downstairs, and told her to use the telephone if she wanted to talk to the petitioner. Madeline Smith then talked to the petitioner over the telephone for about twenty minutes during which time she told him that if he would come to her room at the William Penn Hotel, where she was staying, where they could talk undisturbed, she would "ease his worries." This statement she repeated several times. Later, when he refused to comply with her request, Madeline Smith became very angry, and said over the telephone: "I and Jane (meaning her sister Mary Jane Smith Michaelchick) will make it mighty hot for you if you don't." This she also repeated several times until the conversation was brought to an abrupt end by the telephone operator switching her off.

The morning following this conversation (i.e. December 14th) the trial of the case started and Madeline Smith testified against petitioner, and later was followed by her sister, Mary Jane, who also testified against him. The sister's testimony, however, was wholly discredited by a witness produced by the defense, and by documentary evidence, tending to show that the petitioner at the time of the

alleged transportation of the said Mary Jane Smith Michaelchick was not either in the state of Pennsylvania or Ohio, but was in California with his wife, who was ill at that time.

Counsel for petitioner was not informed of Madeline Smith's conduct, which had taken place during the night, when the trial of the case started on the morning of December 14th. However, after the Court had adjourned its session in the afternoon, the petitioner told his counsel what had taken place, and said counsel made an investigation at the hotel, talked with the house detective, and found the facts to be true. He therefore subpoenaed the house detective to come into court the following morning.

On the morning of December 15th counsel for the petitioner requested the Court for leave to further cross-examine the witness Madeline Smith, as requested the day before. When this request was not granted by reason of the fact that the Government rested its case, without giving the petitioner an opportunity to further cross-examine the witness, counsel for the petitioner again requested the court for such leave, as follows:

> "Mr. Petrillo (at side bar): Counsel for defendant Frank Madaffer moves the Court for leave to recall the Government witness Madeline Smith for the purpose of further cross examination, and assigns the following reason for said motion: Counsel has been informed and verily believes and expects to be able to prove that the witness Madeline Smith on the inception of this case, and while the defendant was on trial, approached him and tried to obtain from him an appointment, which he refused to give to her; that later, yesterday morning, December 14, before she came to court, she went to his place of residence, which at that time was Room 286 Fort Pitt Hotel, Pittsburgh, Pa., and tried to force an entrance into his room, which he refused to permit her to do; that she told him at the

time through the door and then on the telephone that she was "going to make it very hot for him, and her sister too," if he wouldn't talk to her. He refused to do that. We claim this shows bias on her part; and on the basis of these facts, which we intend to prove to the Court, we have to ask that her testimony be stricken from the record in its entirety, because it is based upon falsehood and prejudice."

Mr. Boyle: That it seems to me is a matter which should be affirmatively proved and not proved by cross examination.

The Court: Yes, it would be a part of your defense.

Mr. Petrillo: The only thing I want to ask is whether she talked to him. If you think not, I won't ask her then. My impression was I had to lay the foundation for testimony of that type, and I could only lay it by first cross examining the witness. I may be mistaken about the rules of procedure, but that was my impression.

The Court: I think, when your client is on the stand you could ask him questions about attempts of this woman to see him.

Mr. Boyle: If there is any bias, you could prove, that would be perfectly relevant as a matter of defense.

The Court: Then, of course, the Government would have a right to put her on the stand in rebuttal to deny that, if she denies it.

Mr. Petrillo: Would I be permitted, as a matter of defense, to call my client just for this purpose, and then offer further, additional testimony to prove that particular action on her part?

The Court: I think you cannot until you come to your part of the case.—Such of the counsel as desire to make an opening statement to the jury may do so. (See Transcript of testimony, Pages 261, 262, 263.)

Counsel for the petitioner then moved for a directed verdict in all of these indictments, that is, E-4511, E-4512 and E-4515. All these motions were denied by the Court to which counsel requested an exception.

The case then proceeded with the defendant stating what had transpired between him and the witness Smith, and then denying the allegations of the prosecution and particularly of the witness Smith and her sister.

The house detective was called and he identified Madeline Smith as the girl who attempted to enter the room of the petitioner in the Fort Pitt Hotel. The Government did not put Madeline Smith on the stand to deny those facts, as the Court had intimated the prosecution might do, thus depriving the petitioner of the opportunity to cross-examine said witness concerning such very important evidence of bias and unscrupulousness.

The Court at the end of the trial of the case did not comment upon any parts of the evidence, but left the matter in the hands of the jury for its consideration. No mention was made of what had transpired between the witness for the Government, Madeline Smith, and the petitioner, which evidence was not denied by Miss Smith or by the prosecution. The jury, therefore, undoubtedly disregarded the matter entirely as of no importance, and brought in a verdict of conviction against the petitioner.

Questions Presented

There are five questions presented:

1. Did the denying of petitioner's motion to further cross-examine the witness Madeline Smith violate the requirements of the due process of law clause contained in the Fifth Amendment to the United States constitution?

2. Did the trial court's refusal to permit the further cross-examination of said witness materially prejudice petitioner's right to a fair and impartial trial?

3. Can the judgment of conviction be sustained when petitioner's right to a fair and impartial trial was violated in

that he was unable to prove by proper cross-examination the falsity of the accusations against him and the unscrupulous willingness of the Government's witness to testify falsely against him?

4. Did the Circuit Court of Appeals err in holding that no error had been committed by the Court below in refusing the petitioner's request to further examine such an unscrupulous witness, and, by such judgment, deprive the petitioner of a fair and impartial trial?

5. Did the Circuit Court of Appeals in sustaining the judgment of the Court below violate the fundamental rights of the petitioner?

Reasons for Allowance of the Writ

1. The questions presented involve basic rights under the Constitution of the United States and the Articles of Amendment thereto. These rights have been affirmed frequently by this Court as fundamental and the applicability of the provisions of the Fifth Amendment with respect to a defendant's right to an impartial trial under the guarantee of the Sixth Amendment has often been stressed.

2. The decision in the present case is in conflict with and contrary to the decision of the Circuit Court of Appeals of the Ninth Circuit, in the case of *Cossack* v. *United States*, reported in Federal Reporter (2d Series) Volume 63, at Page 511, which held:

> "Refusal of defendant's offer of newly discovered evidence impeaching Government's witness, after repeated unsuccessful offers to lay foundation therefor during and after witness' cross-examination held erroneous."

Your petitioner verily believes that this application presents a case cognizable by this Honorable Court in order

to secure uniformity of decisions among the Circuit Courts of Appeals, and under the Constitution and Statutes of the United States and the rules of this Honorable Court.

WHEREFORE, comes your petitioner, and respectfully prays that a Writ of Certiorari be issued out of and under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals for the Third Circuit, commanding that Court to certify and to send to this Court for its review a full and complete transcript of the record and all proceedings in said suit, being the case numbered and entitled in its docket as "United States of America, Appellee, v. Frank Madaffer, Appellant, No. 8832, October Term, 1944, and that the judgment of said Court be reviewed by this Court, and for such other relief as to this Court may seem proper.

FRANK MADAFFER,
Petitioner;

By EDWARD E. PETRILLO,
Counsel for Petitioner.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 406

FRANK MADAFFER,

Petitioner,

vs.

UNITED STATES OF AMERICA

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

POINT I

The ruling of the trial court denying petitioner's counsel's request to recall an important Government witness, for the purpose of cross-examination on newly discovered material facts, tending to establish said witness' bias and an unscrupulous willingness to testify falsely, was a denial of due process of law in violation of the Fifth Amendment to the Federal Constitution.

The evidence submitted on the part of the Government relied entirely upon the testimony of a co-conspirator, Frank Chessario, and the two alleged victims of the alleged

transportation from the State of Ohio to the State of Pennsylvania in violation of the provisions of the United States Code. The testimony of the co-conspirator was full of contradictions, and, coming from such a suspicious source, could not alone have caused the conviction of the petitioner. The Government had to rely mainly upon the testimony of a Miss Madeline Smith and her sister in order to secure a conviction.

Madeline Smith, according to her own testimony, was then about twenty-eight years of age, and had followed the trade of a prostitute for about fourteen years, and, therefore, started at the age of fourteen. (See notes of testimony, page 138.)

On November 19, 1938, Madeline Smith was convicted of conspiracy to violate the White Slave Act and served time. (Notes of testimony, page 139.) In 1943 she was detained as a material witness in Cuyahoga County for some forty days in connection with proceedings of the same nature. Her reputation and character therefore were very questionable. She had been convicted of felony and apparently was out again under a cloud of felony, in Youngstown, Ohio, where she had appeared as a material witness.

Prior to trial of petitioner's case, she had approached him at the Court House and at his hotel, and promised to "ease his worries." Upon his refusal to speak with her, both in the Court House and later at his hotel, she threatened that she and her sister (another important Government witness) would "make it hot" for him.

It thus became absolutely necessary, in order to determine the truth of her testimony given on direct examination, to inquire from her, first, whether or not she had talked to the petitioner at the Court House before the beginning of the trial, and subsequently at his hotel, and, secondly, her purpose for such action, in order to establish her bias and un-

scrupulous willingness to testify falsely, and thus disclose to the Court the worthlessness of her previous testimony.

It must be borne in mind she had first told the petitioner that she was going "to ease his worries," and then later "that she and her sister were going to make it hot for him."

> "To lay a foundation for the introduction of contradictory statements as impeaching evidence, the attention of the witness must first be drawn, on cross examination, to the time and occasion when, and place where, and person to whom, the varying statements were made." Cyclopedia of Federal Procedure, Vol. 7, sec. 3136, page 101, under the caption "Laying Foundation for Impeachment."

What were the feelings or disposition of the witness Madeline Smith towards the petitioner, when she attempted to approach him?

> "Inquiries into the feelings or disposition of the witness to conceal or pervert the truth are not to be excluded as being collateral. Personal ill will on the part of a witness towards a party to the action is evidence of bias which may affect credibility, and the right to elicit the fact on cross examination may not often be denied without an abuse of discretion which would be deemed prejudicial to the litigant." Ruling Case Law, Vol. 28, page 612, Paragraph 201, under the title, "Bias of Witness."
>
> "A witness may be impeached by showing his bias, as by proving near relationship, sympathy, hostility or prejudice and this may be done by his own testimony or by other evidence * * * Thus, improper conduct at the trial of a case such as an attempt corruptly to influence the result of a trial, is clear evidence of bias and may be shown." Ruling Case Law, Vol. 28, page 615, Paragraph 201, under the title, "Bias of Witness."

In the instant case, counsel for petitioner specifically stated to the Judge of the District Court that he desired to

lay the foundation to impeach the witness (page 262). The Court ruled that matter should be brought out by questioning the petitioner instead ,page 262). This is claimed to be a prejudicial and fundamental error.

Point II

Petitioner was denied the full protection of the due process of law clause of the Fifth Amendment when his counsel was not permitted to cross-examine the Government's witness, Madeline Smith, on material facts strongly affecting her honesty and credibility, after said counsel had notified the trial judge of her conduct and statements immediately before trial, which conduct and statements showed an apparent unscrupulous willingness on her part to falsify her testimony in one form or another.

The Court should have permitted petitioner's counsel to fully cross-examine this witness as to whether or not she had made contradictory statements to the petitioner concerning the nature and character of her testimony prior to the time when she actually testified, since the jury was entitled to know all the facts from which they could draw a proper conclusion. This right to fully present to the jury all of the pertinent evidence was denied the petitioner by the ruling of the Trial Judge of the District Court.

It must be borne in mind that the said witness threatened the petitioner that both she and her sister would "make it hot for him," and that this sister of Madeline Smith was also a very important witness to establish the Government's case. Without her testimony, and that of the witness Madeline Smith, the prosecution was bound to fail for the reason that the only other witness was a co-conspirator, whose testimony was also biased and scarcely worthy of much weight or credibility.

By denying petitioner's request for leave to cross-examine Madeline Smith, the Judge of the District Court also deprived petitioner's counsel from showing to the jury the bias of Madeline Smith's sister, as her examination in chief did not reveal the statements made by Madeline Smith to the petitioner, or the understanding "to make things hot" for said petitioner, which understanding apparently existed between the two sisters.

Your Honorable Court has repeatedly emphasized that:

> "Cross-examination of a witness is a matter of right. * * * Its permissible purposes, among others, are * * * that facts may be brought out tending to discredit the witness by showing that his testimony in chief was untrue or biased. * * *"
>
> *Alford* v. *United States*, 282 U. S. 687, 691-693, 63 Federal Reporter (2d Series), Page 516.

> "Counsel often cannot know in advance what pertinent facts may be elicited on cross-examination. For that reason it is necessarily exploratory; and the rule that the examiner must indicate the purpose of his inquiry does not, in general, apply. * * * It is the essence of a fair trial that reasonable latitude be given the cross-examiner, even though he is unable to state to the court what facts a reasonable cross-examination might develop. Prejudice ensues from a denial of the opportunity to place the witness in his proper setting and put the weight of his testimony and his credibility to a test, without which the jury cannot fairly appraise them. * * * To say that prejudice can be established only by showing that the cross-examination, if pursued, would necessarily have brought out facts tending to discredit the testimony in chief, is to deny a substantial right and withdraw one of the safeguards essential to a fair trial. * * * In this respect a summary denial of the right of cross-examination is

distinguishable from the erroneous admission of harmless testimony."

Alford v. *United States*, 282 U. S. 687, 691-693, 63 Federal Reporter (2d Series), Page 516.

Your Court has also held in the case of *Heard* v. *United States*, 255 F. 829, 832, and the case of *United States* v. *Phelan* (D. C.), 252 F. 891, 892, that:

"It is elementary, of course, that on cross-examination a witness may be asked whether he did not make certain statements inconsistent with his present testimony."

The language in the above case continues as:

"A full cross-examination of a witness upon the subjects of his examination in chief is the absolute right, not the mere privilege, of the party against whom he is called, and a denial of this right is a prejudicial and fatal error."

As was said in *United States* v. *Keown*, 19 Federal Supplement, 639, under Point (6) on Page 646:

"Every accused person has the right to cross-examine on material facts every witness who testified against him. This has been the rule ever since the law became certain and stabilized, and is a part of due process, which found its expression in the Fifth and Sixth Amendments to the Constitution. See Hale's History of the Common Law, page 145; Starkie on Evidence (2d Ed) Vol. 1, page 160."

Point III

The Circuit Court of Appeals of the Third District, is sustaining the judgment of the court below, not only violated the fundamental rights of the petitioner, but its decision appears to be in conflict with the decision of the Circuit Court of Appeals for the Ninth Circuit in the case of Cossack v. United States, No. 6947, reported in Federal Reporter, 2d Series, Volume 63, at page 511, wherein it was held that the judge of the District Court had erred in denying the defendant-appellant the right to cross-examine one of the Government witnesses, after the defense had made some unsuccessful attempts or offers to lay the foundation for her impeachment.

This apparent conflict of decisions tends to create uncertainty in a matter involving fundamental rights and requires the decision of higher authority for a final determination.

The Honorable Judge Wilbur Sawtelle, in writing the opinion for the Circuit Court of Appeals for the Ninth Circuit, as above set forth, stated as follows:

> "It must be remembered that Mrs. Totten herself had been called by the government after it had rested its case-in-chief; that the defense had made repeated and unsuccessful offers to lay the foundation for this impeachment during and after her cross-examination; that she was already under a felony cloud; that her testimony, if believed, would convince the jury that not only was the defendant Cossack guilty but was willing to resort to the most heinous crime known to the law in order to conceal his guilt; and that the impeaching evidence, on its face, disclosed that it was 'newly-discovered.' In view of these circumstances, we believe that the court committed an abuse of discretion in refusing the appellant's offer to present this evidence to the jury, tardy though the offer was.

Such refusal, we believe, deprived the appellant of a complete opportunity of presenting his case, and therefore fell short of the Anglo-Saxon conception of a fair trial."

"We cannot say that the jury would have convicted the appellant had it disbelieved Mrs. Totten's testimony."

In the case at bar the situation appears to be exactly the same. The government witness Madeline Smith, who had been convicted of a felony, and was under a cloud of felony immediately before the trial of the case, made contradictory statements to the petitioner concerning the testimony to be given by her in court at the trial of his case. These facts were brought to the attention of the Judge of the District Court by motions placed on the record and by verbal statements off the record, but, yet, the court refused to recall the witness so that defense counsel might cross-examine her for the purpose of discrediting her testimony and impeaching her credibility. Such refusal, we believe, deprived the petitioner of a complete opportunity of presenting his case, and, quoting from the learned opinion of the Circuit Court of Appeals, above cited, "fell short of the Anglo-Saxon conception of a fair trial."

Finally, as Judge Sawtelle stated in the case above cited, *Coassacks* v. *United States,* we, too, contend that we can not say that the jury would have convicted the petitioner had it disbelieved Miss Smith's testimony.

Conclusion

We respectfully submit that this is a case eminently proper for this Honorable Court to Review.

Respectfully submitted,

Edward E. Petrillo,
Counsel for Petitioner.

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669061—45

In the Supreme Court of the United States

OCTOBER TERM, 1945

No. 406

FRANK MADAFFER, PETITIONER

v.

THE UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The *per curiam* opinion of the circuit court of appeals (R. 33)[1] is not reported.

JURISDICTION

The judgment of the circuit court of appeals was entered August 2, 1945 (R. 33–34). The peti-

[1] The printed record filed with the petition for a writ of certiorari consists of the appendix to petitioner's brief in the circuit court of appeals, together with the transcript of the proceedings in that court. References to this document in this brief are designated "R." Petitioner has also filed a typewritten transcript of the trial proceedings. References to the transcript are designated "Tr."

tion for a writ of certiorari was filed September 6, 1945. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rules XI and XIII of the Criminal Appeals Rules promulgated by this Court May 7, 1934.

QUESTION PRESENTED

Whether it was reversible error for the trial court to deny petitioner's motion, made after the Government had rested its case, to recall a government witness for further cross-examination for the asserted purpose of laying a foundation for impeaching the witness' credibility.

STATUTES INVOLVED

Section 2 of the Act of June 25, 1910, c. 395, 36 Stat. 825 (18 U. S. C. 398), known as the Mann Act, provides in part:

> SEC. 2. Any person who shall knowingly transport or cause to be transported, or aid or assist in obtaining transportation for, or in transporting, in interstate or foreign commerce, * * * any woman or girl for the purpose of prostitution or debauchery, or for any other immoral purpose, or with the intent and purpose to induce, entice, or compel such woman or girl to become a prostitute or to give herself up to debauchery, or to engage in any other immoral practice; * * * shall be deemed guilty of a felony, and upon con-

> viction thereof shall be punished by a fine not exceeding five thousand dollars, or by imprisonment of not more than five years, or by both such fine and imprisonment, in the discretion of the court.

Section 37 of the Criminal Code (18 U. S. C. 88) reads:

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be fined not more than $10,000, or imprisoned not more than two years, or both.

STATEMENT

Petitioner was convicted in the District Court for the Western District of Pennsylvania on three indictments charging two substantive violations of Section 2 of the Mann Act (18 U. S. C. 398) and a conspiracy to violate the Act (see Tr. 430–438).[2] He was sentenced to imprisonment for three years on each of the substantive charges and two years on the conspiracy indictment, the sentences to run concurrently (R. 28). On appeal to the Circuit Court of Appeals for the Third Circuit, the conviction was affirmed (R. 33–34).

[2] Copies of the indictments have been lodged in the Clerk's office.

The evidence and proceedings pertinent to the question presented by the petition for a writ of certiorari are as follows:

On December 14, 1944, the first day of the trial (Tr. 2, 73), Madeline Smith, called as a witness on behalf of the Government, testified that on December 10, 1941, she met petitioner and Frank Chessario, a codefendant, in Youngstown, Ohio, for the purpose of obtaining work as a prostitute (Tr. 107–110, 112), that the three of them drove in petitioner's car (Tr. 130) to Meadville, Pennsylvania, and that during the trip petitioner and Chessario told her that she could make a good living in Meadville by engaging in prostitution there at a house on Park Avenue (Tr. 120–121) which they were running and to which they brought her (Tr. 111–112). She further testified that she commenced working at the place as a prostitute and that thereafter on one occasion petitioner paid her for money due her (Tr. 113, 124–125). When asked on cross-examination by petitioner's counsel whether she and petitioner ever had any disagreements and whether she had ever said to him, "I will get even with you," she replied, "I never did" (Tr. 132–133). Mary Jane Michaelchick, a sister of Madeline, testified on behalf of the Government that Madeline introduced her to petitioner in Youngstown in May 1942, that he asked her if she would like to work as a prostitute in one of two houses he owned in

Meadville, and that thereafter one Benny Kaufman and petitioner drove her to a place on West Street, Meadville, where she commenced working as a prostitute (Tr. 184–186, 188–189, 194).

After Madeline and Mary Jane had testified in chief and had been cross-examined separately by petitioner's attorney and counsel for the codefendants, the Government called six other witnesses, offered three exhibits in evidence, and then, shortly after the noon recess on December 15, rested its case (Tr. 197, 207, 224, 234, 242, 254, 260). At this point, counsel for petitioner requested leave to recall Madeline for further cross-examination,[3] stating that he had been informed that at the "inception of this case" she had approached and acted toward petitioner in a manner which indicated bias on her part,[4] and asked that

[3] Just prior to the noon adjournment, petitioner's counsel had addressed the court as follows:

"Mr. Petrillo. On behalf of the defendant Madaffer, we would like in the first place to have some further cross examination of the defendant Shirley Cooper and the witness Madeline Smith; and then also on behalf of Frank Madaffer we would like to make our own witness, the witness Laura Duffy, who is known as Penny, and the witness Martizen for rebuttal, and the witness Sillato for rebuttal."

The United States Attorney then said, "You mean as a matter of defense you wish to call them. Is that correct?" Counsel replied, "Yes, as a matter of defense."

The court made no ruling on this request. (Tr. 253–254.)

[4] The record is silent as to when counsel was first apprised of Madeline's alleged efforts to approach petitioner. The petition states (pp. 5–6) that petitioner brought the matter to the attention of his counsel upon the adjournment of the afternoon session on December 14, following the completion

"on the basis of these facts, which we intend to prove to the court, we have to ask that her testimony be stricken from the record in its entirety, because it is based upon falsehood and prejudice." When the court advised counsel that this matter should be presented as part of petitioner's defense, counsel responded that it was his impression that he was required to lay a foundation for proving the alleged incident by first cross-examining the witness. The court reiterated that counsel would have an opportunity to show that Madeline had attempted to see petitioner as part of his defense. The motion to recall Madeline was accordingly denied. (Tr. 260–264, 286.)

As part of his defense, petitioner introduced the testimony of a hotel detective, who stated that around 12:20 a. m. on December 14, 1944, the day the trial opened, he saw Madeline talking to petitioner through the door of the latter's hotel room, and told her that she would not be allowed to con-

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of Madeline's testimony. Counsel's desire to recall her to the stand was first made known to the court just before the noon adjournment on December 15 (see fn. 3, p. 5, *supra*). It is also asserted in the petition (pp. 7–8) that shortly after he first saw Madeline in the corridor outside the courtroom on the day before the trial opened, petitioner, "being suspicious of Miss Smith's actions, and fearful of possible further wrongdoing on her part, immediately reported the matter to one of the F. B. I. agents, a Mr. Hopkins * * *." In so far as the record shows, however, the only allusion to the asserted disclosure to Hopkins is in the statement by petitioner that he "walked over to Hopkins and asked him if he was using perjured testimony" (Tr. 281–282).

verse there but would have to go to the lobby downstairs, where she might use the telephone. He further testified that he escorted her to the lobby and that from there she carried on a 20-minute telephone conversation with petitioner, no part of which he overheard. (Tr. 269–276.)

Petitioner testified as follows: On December 13, the day before the trial opened, he was in the corridor outside the courtroom when Madeline came along and asked how he was; he told her to go away lest she get into trouble, inasmuch as she was a government witness. She replied that she would not get into trouble, since not she, but Mary Jane, was on his case, and during the conversation she showed him a white card purporting to substantiate that fact. He did not pay much attention to her, but walked over to Mr. Hopkins, an F. B. I. agent, and asked him if he was using perjured testimony (cf. Pet. 8). Later the same day he saw Madeline again in the corridor but said nothing. That evening he went to his hotel room to retire. Shortly after midnight he was awakened by a knock at the door and heard Madeline say, "Let me in"; he refused to open the door and told her to go away. In a few minutes the telephone in his room rang; Madeline was on the wire and told him that if he would come over to her hotel she could perhaps ease his worries, but otherwise she and Mary Jane would "make it mighty hot" for him; he declined to have any-

thing to do with her and returned to bed. (Tr. 279–285.) Petitioner denied that he had ever made arrangements to transport Madeline or Mary Jane, or that he ever had had any connection with the business of prostitution (Tr. 299, 302, 316–317; see also Tr. 329–330, 335).

ARGUMENT

Petitioner contends (Pet. 15–22) that the trial court committed reversible error in denying his motion, made after the Government had rested its case, to recall government witness Madeline Smith for further cross-examination in order to lay a foundation for impeaching her credibility. Counsel argues that it was not until he had concluded his cross-examination of the witness that petitioner apprised him that prior to the trial the witness had approached and told petitioner that if he would see her, she might be able to help him, but that otherwise she and her sister would make it "hot" for him, and that these facts tended to establish an unscrupulous willingness on her part to give false testimony. We submit that the contention and argument are without merit.

It is stated in the petition (pp. 7–8) that on the day prior to the trial Madeline approached and spoke to petitioner in the corridor of the courthouse, and that being suspicious of her actions and fearful of possible wrongdoing on her part, he immediately reported the matter to

one Hopkins, an F. B. I. agent.[5] Elsewhere in the petition (pp. 5–6) it is stated that upon the adjournment at the end of the first day of the trial, "petitioner brought to the attention of his counsel, Edward E. Petrillo, certain actions and statements on the part of said witness Madeline Smith, which occurred during the day and night immediately preceding the opening of the trial"[6] If we accept these statements in the petition, it would seem that petitioner showed greater diligence in disclosing the alleged incidents to the Government than to his own attorney. However, while Miss Smith was being cross-examined by petitioner's counsel, one of the questions asked her was, "You never told Frank Madaffer, 'I will get even with you'?" We submit that this question could very well have been framed upon the basis of information supplied by petitioner that the witness had already displayed her hostility on some occasion or other. But whether petitioner had ever so advised his counsel, the important fact is that the witness answered, "I never did." (See page 4, *supra*.) Inasmuch as the witness thus stated, in effect, that she had never threatened petitioner, it seems clear that further cross-examination would have elicited

[5] The only allusion in the record to the purported disclosure to Hopkins is in petitioner's testimony that "he walked over to Hopkins and asked him if he was using perjured testimony." See page 7, *supra*.

[6] The record is silent as to when petitioner disclosed to his counsel the actions and statements referred to.

no different response to such questioning. Upon the denial of the motion to recall Miss Smith, petitioner took the stand and testified to the alleged incidents concerning which his counsel had sought to question her (*supra,* pp. 7–8). It then became a matter for the jury to evaluate the credibility of the two witnesses and decide whether petitioner or Miss Smith had told the truth. Thus, petitioner was not prejudiced as a result of the denial of his motion seeking further opportunity to attempt to impeach her.

Furthermore, litigants are charged with the responsibility of timely action (See *Gates* v. *United States,* 122 F. 2d 571, 579 (C. C. A. 10), certiorari denied, 314 U. S. 698), and it would seem to be a corollary that any favorable evidence known to them is presumed to be known to their counsel. In addition, the extent of cross-examination with respect to a proper subject of inquiry is within the sound discretion of the trial court, and it may exercise a reasonable judgment in determining when the subject has been exhausted. *Glasser* v. *United States,* 315 U. S. 60, 83; *Alford* v. *United States,* 282 U. S. 687, 694; *Blitz* v. *United States,* 153 U. S. 308; *Storm* v. *United States,* 94 U. S. 76. In the circumstances presented by this record, we submit that the court committed no abuse of discretion when it declined, after the Government had rested its case, to permit further cross-examination of a witness

whom petitioner's counsel had already had ample opportunity thoroughly to cross examine.[7] Cf. *Mears* v. *United States*, 55 F. 2d 745, 747 (App. D. C.).[8]

[7] Petitioner's counsel's cross-examination of Miss Smith covers fifteen pages of the transcript (Tr. 126–137, 146–147, 155), and her cross-examination by counsel for all the defendants covers thirty pages (Tr. 126–155). Such cross-examination searchingly revealed Miss Smith's character as a woman who had long been engaged in prostitution.

[8] Petitioner cites (Pet. 21–22) *Cossack* v. *United States*, 63 F. 2d 511 (C. C. A. 9), as in conflict with the decision below. But there is an obvious distinction between them. In the *Cossack* case, after the Government had rested, the defendant sought to recall a government witness for the purpose of asking a question which would serve as the foundation for the introduction of testimony by another witness calculated to impeach the credibility of the government witness. The court refused to permit the witness' recall, whereupon the defendant attempted to elicit from one of his witnesses the tenor of a conversation which the latter had had with the government witness and which bore on the question of the latter's credibility. The trial court sustained the government's objection to allowing the conversation to be told, on the ground that no foundation had been laid. On appeal, it was held that under the circumstances the trial court committed an abuse of discretion in refusing the defendant's offer to present this evidence to the jury, since the refusal deprived him of a complete opportunity of presenting his case. In the instant case it is true that petitioner was not allowed an opportunity to attempt to prove by cross-examination that the government witness had sought an interview with him before the trial, but the full details of the attempt to obtain an audience were subsequently brought to the attention of the jury by petitioner's own testimony. It is manifest, therefore, that he was given a complete opportunity to present his defense and that he did not suffer the consequences involved in the *Cossack* case.

CONCLUSION

The case was correctly decided below, and it involves no real conflict of decisions or question of general importance. We therefore respectfully submit that the petition for a writ of certiorari should be denied.

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